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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 ACETO AGRICULTURAL CHEMICALS  
4 CORPORATION,

Plaintiff,

5 v.

10 CV 1770 (AJN)

6 BAYER AKTIENGESELLSCHAFT,

7 Defendant.  
8

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9 New York, N.Y.

May 16, 2012

10 9:30 a.m.

11 Before:

12 HON. ALISON J. NATHAN,

13 District Judge

14 APPEARANCES

15 PATTISHALL MCAULIFFE NEWBURY HILLIARD & GERALDSON, LLP

Attorneys for Plaintiff

16 BY: ROBERT M. NEWBURY

PHILLIP BARENGOLTS

17 HOLLAND & HART, LLP

18 Attorneys for Defendant

BY: TIMOTHY P. GETZOFF, P.C.

19 Also present: Randy A. Myers, Ph.D., Bayer Crop Science

20 Michael W. Feinman, Aceto President

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(In open court; case called)

THE COURT: Please be seated.

Continued trial in this matter. Mr. Kippley is on the witness stand for direct examination, which will continue.

Mr. Kippley, I remind you that you are under oath.

Thank you.

THE WITNESS: Yes, your Honor.

THE COURT: Go ahead, Mr. Getzoff.

MR. GETZOFF: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. GETZOFF:

Q. Good morning, Mr. Kippley.

A. Good morning.

Q. Talking about the Proline 75 herbicide product from Aceto, what time of year do the growers and farmers apply this product?

A. Springtime.

Q. Why is that?

A. Because the weeds that you control come just after the ground has been tilled in preparation of planting your crop. The weeds will come right behind that.

Q. Now, did you hear yesterday Dr. Myers talk about how timing of the application of crop protection products is important?

A. Yes.

Q. Do you agree with that?

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Kippley - Direct

1 A. Yes.

2 Q. Do you agree that there are certain windows of application,  
3 so that for sedge control you have got a window in the spring  
4 to apply it; and, in the case of Profine, you have a window  
5 later in the year for controlling diseases?

6 A. Yes.

7 Q. Is Profine 75, is this a type of product that farmers would  
8 keep in stock or keep on hand, like they would, say,  
9 fertilizer?

10 A. No.

11 Q. Why not?

12 A. This is a product, and I think we talked about this  
13 yesterday, again, one of the reasons that we decided to bring  
14 on the generic of this product is that it is really  
15 specialized. So the only time you really use this is when you  
16 have a severe infestation of sedge.

17 Dr. Myers mentioned yesterday there are a lot of  
18 different herbicides, and many of them do have some suppression  
19 or some ability to control sedge. But if you have a very bad  
20 problem, you are going to add this molecule or the Profine 75  
21 to your program.

22 Q. Mr. Kippley, I want to have you take a look at -- I am  
23 going to change gears on you and have you take a look at  
24 Exhibit 5, Aceto's Exhibit 5 in the notebook.

25 What is Exhibit 5?

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Kippley - Direct

1 A. This is a sale invoice for Profine 75.

2 Q. What is the date of this invoice?

3 A. The date of the invoice is March 24, 2009.

4 MR. GETZOFF: Your Honor, we offer Aceto's Exhibit 5  
5 into evidence.

6 MR. NEWBURY: No objection, your Honor.

7 THE COURT: Thank you. Aceto Exhibit 5 is admitted.

8 (Plaintiff's Exhibit 5 received in evidence)

9 BY MR. GETZOFF:

10 Q. Mr. Kippley, is this invoice, is this how, is this  
11 generally how Aceto's invoices for the Profine 75 product look?

12 A. Yes.

13 Q. Is this the first invoice that -- the first sale of Aceto's  
14 Profine 75 product?

15 A. This was our first sale, yes.

16 Q. Take a look at Exhibit 8, please. What is Exhibit 8,  
17 Aceto's Exhibit 8?

18 A. This is a copy of the Profine 75 label.

19 Q. Is this the same -- this is a multipage document. It goes  
20 from Bates number Aceto 61 through Aceto 168. On the last page  
21 there is also a separate page number saying 108 pages. Did I  
22 get that right?

23 A. Yes.

24 Q. Is this the same content that if you look at Aceto's  
25 Exhibit 28, the actual bottle in front of you, is contained in

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Kippley - Direct

1 the plastic folder that is affixed to the cap?

2 A. Yes.

3 Q. Although in bigger format?

4 A. Yes.

5 MR. GETZOFF: Your Honor, we offer Exhibit 8 into  
6 evidence.

7 MR. NEWBURY: No objection, your Honor.

8 THE COURT: Thank you. Aceto Exhibit 8 is admitted.

9 (Plaintiff's Exhibit 8 received in evidence)

10 BY MR. GETZOFF:

11 Q. Mr. Kippley, could you look at Exhibit 6, please, Aceto's  
12 Exhibit 6. This is a four-page document of pictures. Can you  
13 identify them, please?

14 A. These are pictures of our Profine 75 packaging.

15 Q. Is this the box that the bottles, that Exhibit 28 would  
16 come in?

17 A. That's correct.

18 Q. If you look at the last page of Aceto's Exhibit 6, does  
19 this show that there are nine bottles that would fit in a full  
20 box?

21 A. Yes.

22 Q. One is missing in that material?

23 A. Yes.

24 MR. GETZOFF: Your Honor, we offer Exhibit 6 into  
25 evidence.

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Kippley - Direct

1 MR. NEWBURY: No objection, your Honor.

2 THE COURT: Thank you. Aceto Exhibit 6 is admitted.

3 (Plaintiff's Exhibit 6 received in evidence)

4 BY MR. GETZOFF:

5 Q. And just for clarification, is this how the boxes always  
6 looked, the depictions in Aceto's Exhibit 6, is this how the  
7 boxes always looked --

8 A. Yes.

9 Q. -- when the boxes are shipped?

10 A. Yes.

11 THE COURT: I ask for similar clarification on Exhibit  
12 8, which is the Profine label. Has that label changed over  
13 time? Is this a current label? Has it remained the same since  
14 Profine was introduced?

15 THE WITNESS: It's remained the same.

16 THE COURT: Thank you.

17 BY MR. GETZOFF:

18 Q. Mr. Kippley, let me have you look at Exhibits 2, 3, and 4.  
19 Just to speed things along, these are sales reports. These are  
20 unobjected exhibits, these are sales reports of Aceto. Is that  
21 right?

22 A. That's correct.

23 Q. Showing sales of the Profine 75 product for the year -- for  
24 the year stated in the document?

25 A. Yes.

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Kippley - Direct

1 MR. GETZOFF: Your Honor, we offer Exhibits 2, 3 and 4  
2 into evidence.

3 MR. NEWBURY: No objection.

4 THE COURT: Okay. Thank you. Aceto 2, 3, and 4 are  
5 admitted.

6 (Plaintiff's Exhibits 2, 3, and 4 received in  
7 evidence)

8 BY MR. GETZOFF:

9 Q. Aceto's Exhibit 11, Mr. Kippley, could you identify what  
10 Aceto Exhibit 11 is?

11 THE COURT: Sorry, my copies of 2, 3, and 4 -- well, 4  
12 I can read the date, I cannot read the date on 2 and 3.

13 BY MR. GETZOFF:

14 Q. Mr. Kippley, let's take a look at Exhibit 2. Does --

15 THE COURT: I mean just the date in the upper  
16 right-hand corner. I can read the period date.

17 Q. Let me just ask this question. Mr. Kippley, there is a  
18 date in the upper right-hand corner and a time, but then there  
19 is a range of dates for period one and period two. What is the  
20 difference?

21 A. Well, the upper right-hand corner looks like when you  
22 three-hole punched it, you punched out the day. That's the  
23 date when you printed the report.

24 Q. Okay, so --

25 A. And then --

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Kippley - Direct

1 Q. Please continue.

2 A. Then if you go where it says period one and period two,  
3 basically the computer report says, well, those are the sales  
4 between those periods.

5 THE COURT: Thank you.

6 Q. Back to Exhibit -- Aceto's Exhibit 11, Mr. Kippley.

7 A. So this is a sales spreadsheet that we are using to look at  
8 the sales of Profine 75 by customer and by ship-to location.

9 Q. So did a customer -- I see three customers on the left-hand  
10 column. Are those the three distributors that we have heard  
11 testimony about that are the direct customers for the Profine  
12 75 product?

13 A. Yes, those are the distributor customers.

14 Q. What is the location --

15 A. So these are locations where these are the retail locations  
16 that we would ship the product into that -- where it, in turn,  
17 gets sold to the farmer.

18 Q. Does this cover sales for 2009 and most of 2010?

19 A. Yes, that's correct. We are basically looking here saying  
20 what did we sell in 2009; and then as we are entering into  
21 2010, we wanted to make sure that customers who bought or  
22 retail locations that received products from us the year  
23 before, that we are making sure that they were reordering the  
24 product.

25 MR. GETZOFF: Your Honor, we offer Aceto's Exhibit 11



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Kippley - Direct

1 into evidence.

2 MR. NEWBURY: No objection, your Honor.

3 THE COURT: Aceto Exhibit 11 is admitted.

4 (Plaintiff's Exhibit 11 received in evidence)

5 BY MR. GETZOFF:

6 Q. Mr. Kippley, we heard yesterday that Bayer has a number of  
7 pesticide products, fungicide and insecticide and herbicides  
8 that use P-R-O, "pro," as the prefix. To your knowledge, is  
9 Bayer, aside from Aceto's Profine 75 product, is Bayer the only  
10 product that uses "pro" as a prefix for crop protection  
11 products?

12 A. No, there are other products in the industry that use that  
13 P-R-O.

14 Q. Could you take a look at Aceto's Exhibit 27, please.  
15 Aceto's Exhibit 27 is, I think, 25 or so pages of what looks  
16 like labels, different labels. Can you identify these for us,  
17 please.

18 A. Yes. First one is ProCon-Z.

19 Q. If you could just flip through these, I don't want to spend  
20 a ton of time on this, because there are so much pages, but  
21 generally what is contained in Exhibit 27? And let me say for  
22 the record that this was a deposition exhibit, so at least my  
23 copy says Exhibit 21 in the lower right-hand corner, but that's  
24 erroneous for purposes of this trial exhibit. It is Aceto's  
25 Trial Exhibit 27.

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Kippley - Direct

1           Let me repeat my question. Mr. Kippley, could you go  
2 through this and just briefly explain what all these documents  
3 are?

4       A. Okay, sure. So we are looking at ProCon-Z fungicide. It  
5 is a fungicide for sale in the market. The next one is  
6 insecticide. The name is Proclaim from Syngenta. The next one  
7 is from Dow Agro. It is a fungicide, PropiMax. The next one  
8 is a Prometryne herbicide. We have a product from Agriphar  
9 company called Promess fungicide. There is another product,  
10 ProFume. It's a fumigant. Another product is ProDeuce, which  
11 is an herbicide. We have ProClipse from Nufarm, which is  
12 another herbicide product.

13      Q. Let me stop you, Mr. Kippley. Are you familiar with these  
14 companies, Dow and Nufarm, and Loveland, that are -- Syngenta  
15 is the second one for Proclaim, that are selling these  
16 products?

17      A. Yes. These are all major companies in our industry.

18           MR. GETZOFF: I am just going to, I think -- first,  
19 let me offer Exhibit 27 into evidence, your Honor.

20           MR. NEWBURY: No objection, your Honor.

21           THE COURT: Aceto 27 is admitted.

22           (Plaintiff's Exhibit 27 received in evidence)

23           MR. GETZOFF: Your Honor, I wasn't going to have Mr.  
24 Kippley do anything other than go through and read them, but it  
25 is self-evident.

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Kippley - Direct

1 THE COURT: I have got it. Thank you.

2 MR. GETZOFF: Thank you.

3 Thank you, Mr. Kippley. I have nothing further.

4 THE COURT: Mr. Newbury, you may cross.

5 CROSS EXAMINATION

6 BY MR. NEWBURY:

7 Q. Mr. Kippley, let's start with Exhibit 27 you were just  
8 dealing with. Where did you get those labels?

9 A. These are all available on CDMS.

10 Q. What is CDMS?

11 A. CDMS is the industry database that all of the manufacturers  
12 are not required but are encouraged to put their labels on so  
13 that everybody in the industry can look up these products and  
14 the labels and how the products are used.

15 Q. Do you know the extent of the use of any of those products?

16 A. I don't understand your question in terms of --

17 Q. Do you know the extent to which companies use any of -- use  
18 those labels? Do you know the amount of sales that any company  
19 has under --

20 THE COURT: You mean with reference to the labels  
21 contained in Exhibit 27?

22 MR. NEWBURY: Yes, your Honor. I am trying not to do  
23 this one at a time.

24 THE COURT: I appreciate it. I just wanted to make  
25 sure.

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Kippely - Cross

1 Q. That's exactly what I mean.

2 A. So if you are asking me do I know the annual sales volume  
3 of the products that we just talked about, I do not know the  
4 annual sales volume of the products that I just read.

5 Q. Do you know if any of them are advertised at all?

6 A. No, I do not.

7 Q. Do you know how long they have been in use?

8 A. Just to go back to, I know if they are advertised, I have  
9 seen ads for a couple of these products, but -- and then your  
10 second, question, please, is how long have they been used?

11 Q. Do you know how long they have been used?

12 A. No, I do not.

13 Q. Turning to your Profine product, do you ordinarily refer to  
14 Profine simply as Profine when you are communicating with  
15 customers?

16 A. We will sometimes, I think, as you saw in our invoices we  
17 invoice as Profine 75, but many times we do use just the word  
18 Profine.

19 Q. Now, my question was do you ordinarily refer to it that way  
20 when you are referring to customers?

21 A. Yes, I typically refer to it as Profine.

22 Q. Do customers refer to it that way back to you?

23 A. Yes, they do.

24 Q. Most people you hear simply refer to the product as  
25 Profine.

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Kippely - Cross

1 A. That's correct.

2 Q. When you were with Monsanto, you visited with farmers, is  
3 that correct?

4 A. Yes.

5 Q. When was that?

6 A. 19 -- I was employed by Monsanto 1988 -- well, 1986 through  
7 1990. So I was visiting farmers throughout my tenure with the  
8 company.

9 Q. Where were you employed after that?

10 A. I was employed by the Oil Dry Corporation.

11 Q. Did you visit with farmers then?

12 A. Yes, I did.

13 Q. Did you visit with farmers for Aceto?

14 A. Yes.

15 Q. Do you recall giving a deposition in this case?

16 A. Yes.

17 Q. Do you recall telling us there that you don't really talk  
18 to farmers because the distributors would be upset if you did?

19 A. That's correct.

20 Q. Is that a true statement that you don't really talk to  
21 farmers?

22 A. That's correct.

23 Q. Did you also tell us that you never visit farms and don't  
24 know how Profine is applied to crops?

25 A. I don't recall making that statement.

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Kippley - Cross

1 (Pause)

2 THE COURT: Do you have copies for the court and  
3 witness?

4 MR. NEWBURY: Yes, I do, your Honor.

5 BY MR. NEWBURY:

6 Q. I invite your attention to page 74, Mr. Kippley. Reading  
7 from line 7 of your deposition --

8 A. Just one moment, please. Okay.

9 Q. "In your position now, do you ever go out to growers to  
10 promote Aceto's products?

11 "A No."

12 Was that truthful testimony?

13 A. Yes.

14 (Pause)

15 THE WITNESS: Can I comment? Or --

16 THE COURT: Do you want to ask further, Mr. Newbury?

17 MR. NEWBURY: No, your Honor.

18 THE WITNESS: Oh.

19 BY MR. NEWBURY:

20 Q. Did you also tell us that you believe, in your testimony  
21 that you believe the larger growers are sophisticated  
22 purchasers?

23 A. Yes.

24 Q. I invite your attention to your deposition, page 148/line  
25 14, reading questions, beginning on 14:

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Kippely - Cross

1 "In your experience, are growers, are some of them  
2 less sophisticated or more sophisticated?

3 "A I don't have contact with growers, so I can't comment.  
4 Things changed a lot in the last 25 years.

5 "Q Is it fair to say you don't know what the grower population  
6 is like now?

7 "A That's correct, I do not.

8 "Q Is it fair to say that you don't know who specifically  
9 applies Profine to crops at this time?

10 "A I do not."

11 Do you recall being asked those questions and giving  
12 those answers?

13 A. Yes.

14 Q. Was that truthful testimony?

15 A. Yes.

16 Q. So you don't know what the grower population is like now;  
17 that is correct?

18 A. Again, I don't recall all the other questions that were  
19 asked prior to what is stated here. I can only tell you that  
20 my father is a farmer; that my cousin is a professional custom  
21 applicator; that in the last six months I have been on farms;  
22 that my definition of promoting the product, to my definition,  
23 is to sell the product. We do not sell to farmers, but I  
24 regularly am on farms and am on places where the products, all  
25 of our products are being used that, let's say, a consultant

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Kippely - Cross

1 that we are using. But I am not selling to farmers. I am not  
2 promoting directly to farmers. I certainly have knowledge of  
3 what our product -- what's being used and who these people are.

4 Q. Is it true that you don't have contact with growers now?

5 A. I do have contact with growers now, specifically apple  
6 growers is the most recent contact I have had a few months ago.

7 Q. So your answer at the deposition -- was your answer correct  
8 at the time of the deposition?

9 MR. GETZOFF: Your Honor, can we have a page and line  
10 for this particular --

11 THE COURT: I assume he is talking about line 16 which  
12 says "I don't have contact with growers."

13 MR. NEWBURY: That is correct.

14 A. Well, the thing is, at the time of the deposition, it may  
15 have been some time since I was actually talking to growers,  
16 but in the last six months we were involved with an apple  
17 product, where we were in touch with growers, evaluating plots.

18 Q. Does the apple product use Profine?

19 A. No, it does not.

20 Q. And it wouldn't use Proline either, would it?

21 A. I am not familiar if Proline is registered for apples.

22 Q. At the time of your deposition, it is true that you didn't  
23 know what the grower population is like now, isn't that  
24 correct?

25 A. If it is talking about in general context of growers and



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Kippely - Cross

1 applicators throughout the United States, I still have general  
2 awareness of that.

3 Q. And that goes back to 25 years ago with Monsanto?

4 A. Well, Monsanto and my weekend visits to my family farm and  
5 to just a recent visit to apple orchards in upstate New York  
6 that we are launching.

7 Q. The family farm was a dairy farm, is that correct?

8 A. That's correct, but they raise corn and soybeans and other  
9 products; and, as I mentioned, my cousin is a commercial  
10 pesticide applicator.

11 Q. Going back to Exhibit 27 again, that's the third-party  
12 uses, are any of those uses, are any of those trademarks  
13 similar as similar as Proline is to Profine?

14 A. Many of them, again, have the P-R-O. Some of them have the  
15 same number of words. But, no, none of them are different by  
16 one letter.

17 Q. Now, inviting your attention to Defendant's Exhibit 11, did  
18 I understand you correctly this shows where at the time of this  
19 exhibit your Profine product was sold?

20 A. Yes, that's correct.

21 Q. The product was sold in Pennsylvania?

22 A. Yes, that's correct.

23 Q. Also in New York, Indiana, and Wisconsin?

24 A. That's correct.

25 Q. If I can invite your attention back to your Exhibit 1, that

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Kippely - Cross

1 is, Aceto's Exhibit 1, it is the file of your trademark  
2 application.

3 Do you have that?

4 A. Yes, I do.

5 Q. It was on the basis of this file that you decided your  
6 trademark was -- you were good to go with use of Profine?

7 A. Earlier communication that we had that it was good to go.

8 Q. Did you read this file?

9 A. No, I didn't read the file.

10 Q. I invite your attention to the first page of that file.

11 THE COURT: Mr. Newbury, you mean page one of the  
12 exhibit?

13 MR. NEWBURY: Yes.

14 Q. Do you see the language -- did you ever read this page  
15 before?

16 A. You mean the link that is listed on the card?

17 Q. Did you ever read the page before, the first page of the  
18 Exhibit 1?

19 A. Yes.

20 Q. Did you read that -- then you noticed that it told you that  
21 the mark was going to be published in the official gazette?

22 A. Yes, April 21.

23 Q. And it also told you that any party who believes that they  
24 will be damaged by registration of the mark may oppose its  
25 registration by filing an opposition to registration?

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Kippely - Cross

1 A. Yes.

2 Q. And you understood that if an opposition were filed, you  
3 would not receive your registration?

4 A. I didn't understand that if somebody opposed I would not  
5 receive it, but only that somebody opposed it.

6 Q. Did you wait to see if somebody would oppose it before you  
7 began use?

8 A. No, because all of our indications is that there wasn't a  
9 problem at all with the mark, and that's why we proceeded  
10 forward to commercialize and begin sale of the product.

11 Q. And you continued to so proceed after somebody did oppose  
12 it, isn't that true?

13 A. Yeah, we had already -- by the time we had learned or  
14 received a letter from Bayer that they opposed the mark, based  
15 upon the previous information that there was not a problem with  
16 the mark, we had already packaged and branded and shipped and  
17 sold the product, and the product was already being applied by  
18 the time we received word that there was opposition, that  
19 somebody felt there was a problem with the mark.

20 Q. If you had waited to see if there were an opposition, would  
21 you have taken all those steps?

22 A. Well, we would have missed a season.

23 Q. So it was really the fact that you needed to be out for the  
24 season that caused you to proceed?

25 A. And that we were aware at the time that there was no

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Kippely - Cross

1 competing marks, that everything was in order.

2 Q. You weren't aware that everybody would agree with that and  
3 nobody would file an opposition.

4 A. At the time we had no indication that there was a problem.

5 Q. Did you have any indication that nobody would file an  
6 opposition?

7 A. We had an indication that there were no marks and that  
8 there wasn't a problem.

9 Q. That was based on your communication from Ms. Strazzo?

10 A. That's correct. And the fact that we had word that PTO  
11 approved the mark.

12 Q. Mr. Kippely, do you recall preparing and signing a trial  
13 declaration when this case was before Judge Berman?

14 A. Yes, I do.

15 Q. And you signed that under penalty of perjury?

16 A. Yes.

17 Q. And I assume you read it very carefully before you signed  
18 it?

19 A. Yes.

20 Q. I am going to hand you a copy of your declaration.

21 I invite your attention to page five of that trial  
22 declaration, and particularly to the final sentence appearing  
23 in the incomplete paragraph at the top.

24 Do you see that?

25 A. The last paragraph.

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Kippely - Cross

1 Q. Particularly the language, "To my knowledge, Aceto's  
2 Proline 75 herbicide is not sold from any of the same outlets  
3 or used by the farmers" -- "same farmers that use or buy  
4 Bayer's Proline fungicide."

5 Do you see that?

6 A. Let me find where you are at here.

7 Q. Page five, the last sentence at the top of the paragraph --  
8 at the end of the first paragraph.

9 A. "Ms. Strazzo also works with attorney Joe Kaufman."

10 Q. No, page five.

11 A. Page five.

12 THE COURT: It is the ride-over paragraph at the top  
13 of the page.

14 THE WITNESS: Oh, I'm sorry, top of the page.

15 Q. Thank you. That was the description I was trying --

16 A. Sorry.

17 THE COURT: Take your time and read it, if you would  
18 like.

19 THE WITNESS: Yes.

20 A. "We do sell a small amount of Profine 75 in Wisconsin for  
21 vegetables that are grown there to my knowledge."

22 Q. No. The sentence --

23 THE COURT: He is there now. He is there now.

24 Q. The last sentence.

25 A. Oh, Aceto's Proline 75. There is a typo here.

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Kippley - Cross

1 Q. That's your mistake.

2 A. That is correct.

3 Q. And you made that in sworn testimony under penalty of  
4 perjury.

5 A. That's correct.

6 Q. And that was because of the similarity of the marks.

7 A. Or that the Proline was the sentence below.

8 Q. I'm sorry. I couldn't hear you, sir?

9 A. Yes, or that the Proline sentence was listed below.

10 MR. NEWBURY: I have no further questions, your Honor.

11 THE COURT: Thank you.

12 Mr. Getzoff, any redirect?

13 REDIRECT EXAMINATION

14 BY MR. GETZOFF:

15 Q. Mr. Kippley, Exhibit 11 shows sales of Profine 75 herbicide  
16 to Pennsylvania, Wisconsin, Indiana, and New York. To your  
17 knowledge, are there vegetable crops grown in each of those  
18 states?

19 A. Yes.

20 MR. GETZOFF: Thank you. Nothing further.

21 MR. NEWBURY: Nothing further, your Honor.

22 MR. GETZOFF: Nothing from us, your Honor.

23 THE COURT: Mr. Kippley, you may step down. Thank  
24 you, you are excused.

25 (Witness excused)

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1 MR. GETZOFF: Your Honor, I believe that concludes the  
2 evidence.

3 THE COURT: Thank you. Would counsel like a short  
4 break before you proceed to summation? I'm sorry, do you have  
5 a rebuttal?

6 MR. BARENGOLTS: Your Honor, may we answer on the  
7 rebuttal after the recess?

8 THE COURT: No. We will either finish up the  
9 testimony or take a break.

10 MR. NEWBURY: May we take a minute?

11 THE COURT: You may take a minute.

12 (Counsel confer)

13 MR. BARENGOLTS: Your Honor, we would like to take  
14 about five minutes for a quick rebuttal, if that's all right?

15 THE COURT: Okay.

16 MR. BARENGOLTS: We would like to call Dr. Myers back  
17 to the stand.

18 THE COURT: Thank you.

19 RANDY A. MYERS,

20 called as a witness by the defendant,

21 having been duly sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MR. BARENGOLTS:

24 Q. Dr. Myers, we just heard some testimony about the timing of  
25 Profine application. Can Profine and Proline be applied at the

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Myers - Direct

1 same time?

2 A. Yes, they can. Proline is used on a lot of different  
3 crops, and it can be used any time from preemergent  
4 application, when the furrow's opened and sprayed, when the  
5 seed is placed in the ground. We can spray it right after the  
6 plant emerges from the soil all the way up until the preharvest  
7 interval of whatever the particular crop is.

8 MR. BARENGOLTS: Thank you, Dr. Myers. That's all we  
9 have.

10 THE COURT: Mr. Getzoff?

11 CROSS EXAMINATION

12 BY MR. GETZOFF:

13 Q. Dr. Myers, with respect to corn, didn't you testify that it  
14 is applied late in the season, when the corn has reached a  
15 certain height and growth development?

16 A. For corn that is the case, yes.

17 Q. What about dry beans?

18 A. Dry beans, the application could be at any time after the  
19 plant emerges from the soil.

20 MR. GETZOFF: Thank you.

21 THE COURT: Thank you, Mr. Myers. You may step down.

22 (Witness excused)

23 THE COURT: Anything further, Mr. Barengolts.

24 MR. BARENGOLTS: No, your Honor.

25 THE COURT: Mr. Getzoff?



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1 MR. GETZOFF: No, your Honor.

2 THE COURT: Thank you. Anything further before I give  
3 you a ten-minute recess before summation?

4 MR. BARENGOLTS: Nothing from Bayer, your Honor.

5 MR. GETZOFF: Nothing from Aceto, your Honor.

6 THE COURT: All right. Thank you. We will break for  
7 ten minutes and then go to summation.

8 (Recess)

9 (Continued on next page)

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Summation - Mr. Newbury

1 THE COURT: So I think we decided Bayer are first for  
2 30 minutes and Aceto for 35 if you wanted it and five for  
3 rebuttal for Bayer.

4 MR. NEWBURY: Thank you, your Honor.

5 THE COURT: Go ahead, Mr. Newbury.

6 MR. NEWBURY: May it please the Court, as Mr.  
7 Barengolts told you in opening Bayer is here seeking protection  
8 from likelihood of confusion. This likelihood of confusion  
9 takes two forms here. One is the well, long-establish  
10 trademark standard of likelihood of confusion as to source.  
11 That is set forth in the statute, 15 U.S c., 1114 and many  
12 cases. It simply means as applied to this case that consumers  
13 are likely to believe that Profine and Proline come from the  
14 same source. That source can be identified or it can be  
15 thought to be Bayer. It doesn't matter either way. That  
16 likelihood of confusion can occur at the point of sale or at  
17 the time of sale or it can occur at any time after the sale.  
18 Postsale confusion is recognized. In other words, seeing the  
19 products together at any time later, Oh, those come from the  
20 same source, that is likelihood of confusion.

21 The other form of likelihood confusion in this case,  
22 and the statute actually says likelihood of confusion,  
23 deception or mistake is the mistake that could happen in the  
24 application of the products. That is, that the wrong product  
25 will be used because of the similarity of the marks.

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Summation - Mr. Newbury

1           Aceto's opening argument here and their evidence are  
2 both largely devoted to claiming that no one would buy an  
3 herbicide when they wanted to buy an insecticide. But Bayer  
4 never claimed they would. Bayer simply claims that both would  
5 be thought to come from the same source. Aceto at this point  
6 has yet to even address the issue of source confusion.  
7 Probably the closest case on the facts here is a decisions by  
8 Court of Customs and Patent Appeals, which is the predecessor  
9 court to the current Federal Circuit Court of Appeals.

10           Aceto argued in its opening that you would never see  
11 another case dealing with products regulated by these, but that  
12 case dealt precisely with those products. It considered an  
13 agriculture insecticide against an agriculture fungicide. It  
14 is American Cyanamid Company v. United States Rubber, 356 F.2d  
15 1008, a 1966 decision. In that case Saigon, an insecticide,  
16 sold as an emulsible liquid was held likely to cause confusion  
17 with Cyanamid, a fungicide sold as a dry powder. The goods  
18 were specifically found to have a close relationship. Same is  
19 true here.

20           In this circuit, likelihood of confusion is determined  
21 by the eight Polaroid factors. It is not determined by  
22 counting up who has five and who has three and deciding that is  
23 the winner. Different factors have different importance and  
24 that can even vary tremendously from case to case. It is a  
25 balancing act enabling the Court to determine whether there is

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Summation - Mr. Newbury

1     likelihood of confusion.

2             The first factor here is the strength of the mark.  
3     That simply means the degree of distinctiveness, source  
4     indication of the mark. It can come from inherent  
5     distinctiveness or required distinctiveness through substantial  
6     use. Both are present here. There is no claim that Proline is  
7     anything about distinctive. Initially, it is registered. That  
8     confirms the distinctiveness. Additional distinctiveness was  
9     acquired through the long use and well over \$100 million in  
10    sales and extensive advertising.

11            Aceto has introduced some labels for third-party marks  
12    claiming that weakens the pro part of Proline. Aceto  
13    introduced no evidence as to the extent of use or recognition  
14    of those marks as to their sales as to whether anybody even  
15    knows about them. It can't have any effect on weakness without  
16    being known. That is well established by much precedent. More  
17    importantly, though, Bayer is not claiming similarity limited  
18    to the pro part of its mark. We don't claim exclusive rights  
19    in pro. This case is about the similarity between Proline and  
20    Profine, the entire marks. You don't dissect out part of the  
21    mark.

22            The second factor is similarity of the marks. This is  
23    often said to be the most important factor. Simply because if  
24    there isn't similarity of the marks, there can't possibly be  
25    confusion. Here, the similarity was admitted by both Mr.

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Summation - Mr. Newbury

1     Feinman and Mr. Kippley on the stand. Not much of an admission  
2     really because the similarity is obvious. Proline and Profine  
3     varied by one letter. Aceto argued that the package  
4     differences would distinguish the marks, but the farmer often  
5     does not even see the package until after it has been  
6     purchased. The testimony is complete here that they are  
7     ordered orally or by a written message that says, Buy Proline  
8     or Buy Profine.

9             THE COURT: Just to back up on that. You are pointing  
10    to Dr. Myers' testimony?

11            MR. NEWBURY: Actually, I didn't but that is what I  
12    was talking about, but also the prescription testimony that  
13    Mr. Kippley gave where he said that it is like getting a  
14    written prescription from the expert that they take it in. But  
15    I was also referring to Dr. Myers' testimony. Sorry if I  
16    pointed. I simply took off my glasses and waved.

17            THE COURT: No, it was wasn't because of that. It was  
18    just a clarification question. I wanted to know what precise  
19    testimony you were pointing to when you were speaking of when  
20    you made the point about oral or written ordering detached from  
21    a visual of the label.

22            MR. NEWBURY: That's correct.

23            THE COURT: And you are pointing to what you described  
24    as Mr. Kippley's testimony regarding its being similar to  
25    getting a prescription and Dr. Myers' testimony.

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Summation - Mr. Newbury

1 MR. NEWBURY: That's correct, your Honor.

2 THE COURT: Go head.

3 MR. NEWBURY: Moreover, a difference in the packaging  
4 simply cannot overcome the overall similarity in the  
5 trademarks. It is a factor to be considered, but it doesn't  
6 reduce the similarity of the trademarks.

7 The third listed factor, and this is probably the next  
8 most important one, is the relationship.

9 THE COURT: Sorry. I should have said this in  
10 advance, I do treat this a little like oral argument so if I  
11 keep you substantially over your time for questioning, I will  
12 be sure to give you more time and even it out.

13 On that last point, with respect to your two theories  
14 of source confusion and product confusion, you just said that  
15 the packaging difference doesn't particularly make a difference  
16 with respect to similarity. With respect to your theory of  
17 product confusion, given that even after it is ordered it has  
18 to be applied, and your theory is essentially that there will  
19 be a misapplication of the products, what significance then  
20 does the packaging and labeling have?

21 MR. NEWBURY: Probably even less there than in the  
22 source situation, your Honor. The applicator will simply be  
23 told, Put Proline on this product, and will mistakenly pick up  
24 Profine. There is no way to know if the applicator knows what  
25 the packaging for Proline will look like. He is only told the

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Summation - Mr. Newbury

1 trademark.

2 THE COURT: You are speaking of consultant applicators  
3 or the applicators--

4 MR. NEWBURY: Yes. Both consultant applicators and  
5 the farmers that ask their -- I am trying to think of a better  
6 word than hired hand, but the hired hand to do it.

7 THE COURT: What testimony or exhibits do you point to  
8 on this and point?

9 MR. NEWBURY: The mistake? You heard in this  
10 courtroom Mr. Getzoff made mistakes between Proline and  
11 Profine. You heard that Mr. Kippley made such a mistake in  
12 sworn testimony. If these sophisticated people can -- I can  
13 make that kind of mistake. Certainly an unsophisticated  
14 applicator can clearly make the same kind of mistake when  
15 Proline or Profine is mentioned or vice versa.

16 THE COURT: I think in that answer you returned to the  
17 point that the words Proline and Profine are similar?

18 MR. NEWBURY: Yes, your Honor, that is the controlling  
19 message here.

20 THE COURT: I get that. But there are other factors  
21 and it is one thing to say that is an extremely strong factor  
22 in your favor, but I want to make sure I understand your points  
23 with respect to the other factors. I also just want to  
24 understand the point given your theory of product confusion  
25 that someone will pick up the notion that someone will mean to

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Summation - Mr. Newbury

1 apply Proline but will apply Profine instead, I want to make  
2 sure I understand what testimony you are pointing to that would  
3 suggest that the labeling and packaging and I suppose also the  
4 physical nature of the products, dilution from a liquid versus  
5 dilution from a tablet, what evidence suggests that the  
6 similarity of words only would lead to a likelihood of  
7 misapplication?

8 MR. NEWBURY: If the hired hand is told to use Proline  
9 on the product and hears Profine, he is just not going to  
10 beyond looking at the label. If he told to use Profine and --

11 THE COURT: What testimony do you think --

12 MR. NEWBURY: Again, I can refer to the mistakes made  
13 here in court by sophisticated people.

14 THE COURT: Anything else to point to?

15 MR. NEWBURY: Just the unsophisticated nature of these  
16 applicators that Dr. Myers testified about.

17 THE COURT: I understand. Thank you. I think you  
18 were ready to move to proximity.

19 MR. NEWBURY: I was, your Honor.

20 The relationship of the product, probably the most  
21 important. No question these products are not competitive, but  
22 they surely are closely related. They are both agriculture  
23 pesticides. They are both used to increase crop yields. They  
24 pass admittedly through the same channels of trade, through the  
25 same distributors that is, the same retail outlets to the same



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1 farmers. The customers are all farmers. Again, exactly the  
2 same. The same farmer could use both. Both Dr. Myers and Mr.  
3 Feinman talked about that. They can be used on the same  
4 crops -- dry beans, corn, rice. I think I am leaving one out,  
5 but those are the principal ones.

6 As Dr. Myers told you, fungicide and herbicide can  
7 even be mixed together in the same tank and applied together.  
8 The large marketers are known to make both products. Aceto  
9 makes both fungicide and herbicide. So does Bayer. The  
10 customers expect these two types of products to come from the  
11 same company. When they see them with a similar trademark on  
12 it, they will think that they come from the same company.

13 The next factor, likelihood that Bayer will bridge the  
14 cap between fungicide and herbicide. Well, that's certainly  
15 not a factor here. Bayer has already bridged the gap. It  
16 makes the same types of products.

17 THE COURT: I am going to take you back to proximity  
18 for a second. I see that there are four crops, which both  
19 products permissibly may be used on. What evidence have you  
20 put in that you can point me to that suggests that there  
21 actually is overlapping use on any farm, or is this point built  
22 on the possibility of overlap?

23 MR. NEWBURY: Well, I think more the latter, your  
24 Honor. But Aceto uses a label which says the product can be  
25 used on all those products. If they didn't want it used on

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1 those products, they could have deleted them from the label.  
2 They didn't do so. They are telling the customer, You can use  
3 it on these products. If they didn't expect to be used on  
4 those products, they wouldn't claim it on the label.

5 THE COURT: I think that as you said goes to the  
6 latter, that there is the possibility of overlapping use.

7 MR. NEWBURY: I would go further and say probability.

8 THE COURT: What evidence makes it probable?

9 MR. NEWBURY: The fact that they are marketed for the  
10 same products. The label says you can do it. If Aceto doesn't  
11 expect a customer to do it would they make the claim on the  
12 label? They don't need to. They can take it off. Just  
13 practicality. If somebody doesn't expect something to happen,  
14 why would you say you can make it happen? It makes no sense to  
15 do it any other way.

16 THE COURT: Again, I think this is framed within the  
17 context of your theory of product confusion. It is just a  
18 question. I understand the points that you made. My question  
19 is whether or not there is anything else you would point to to  
20 suggest the likelihood or probability of someone actually  
21 having the two products on the same farm meaning to use one but  
22 using the other?

23 MR. NEWBURY: Again, you have the crop rotation  
24 situation where you would have them on the same farm for  
25 totally different crops and you have Dr. Myers' testimony that

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1 growers plant many different crops and they could have them  
2 there in that situation. One for use on one crop and the other  
3 for use on a different crop and they would be in the same shed.

4 THE COURT: Thank you.

5 MR. NEWBURY: Now, I would say even if they weren't  
6 used on the same crop, you still have a relationship between  
7 the products. These are agricultural pesticides that customers  
8 know are made by the same companies.

9 THE COURT: Is this to source confusion?

10 MR. NEWBURY: Yes.

11 THE COURT: You will get to sophistication but with  
12 respect to source confusion is your argument that one looks to  
13 the farmhands for this point or to farmers and to the growers?

14 MR. NEWBURY: To everybody in the chain, your Honor.

15 THE COURT: Thank you.

16 MR. NEWBURY: The next factor is the likelihood that  
17 Bayer will bridge the gap. As I said, they already have. Even  
18 as to the particular products, Profine and Proline, Bayer has  
19 bridged the gap. Both originally could be used on dry beans.  
20 Bayer expanded its use to corn and rice, again increasing the  
21 overlap. Bayer has concrete plans to expand Proline to -- I  
22 never can pronounce this -- cucurbits --

23 THE COURT: I will recognize them as gords.

24 MR. NEWBURY: -- as soon as the EPA approval is  
25 granted. Thus, there is a very substantial overlap in products

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Summation - Mr. Newbury

1 on which Proline and Profine can be used.

2 The the next Polaroid factor is the evidence of actual  
3 confusion. It is well settled that it is not necessary for  
4 likelihood of confusion to have such evidence. The reason is  
5 simply evidence of actual confusion is recognized as being very  
6 difficult to obtain. One of the reasons why it is difficult to  
7 obtain as to source confusion is that it is often because the  
8 person who is confused doesn't know he is confused. They  
9 continue to believe the products come from the same source so  
10 the confusion never comes to anybody's attention.

11 Another reason here is the relatively small sales by  
12 Aceto and only three growing seasons in which there could be  
13 actual confusion. Mr. Feinman claimed there was \$10 million of  
14 claim without any documentary evidence to support that claim.  
15 Aceto's own exhibits contradictive, Exhibits 2, 3 and 4, which  
16 purport to show Profine sales for 2009, 2010, and 2011 total  
17 only \$3.2 million. The documented figures seem to be more  
18 reliable than the testimony here.

19 The final note on evidence of actual confusion relates  
20 to the mistake theory in applying the wrong product. That  
21 probably would be reported because of the disastrous  
22 consequences of such a thing happening. However, even one such  
23 instance, again because of those disastrous consequences, would  
24 be and should be avoided if possible. If this Court believes  
25 that any such mistake is likely to happen, the fact that one

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Summation - Mr. Newbury

1 has occurred at the present time is of no importance because of  
2 the disastrous consequences we are talking about must be  
3 avoided. Again, this is repetition. That such a mistake is  
4 likely to happen is shown by the mistakes made by counsel and  
5 Mr. Kippley in his sworn testimony. If these sophisticated  
6 people in court can mistake one for the other, certainly a  
7 grower or an unsophisticated applicator can make the same  
8 mistake.

9 In his opening argument Mr. Getzoff said that a slip  
10 of the tongue in court is not important. We agree. A slip of  
11 the tongue in court is evidence that a slip of the tongue out  
12 of court and in the field could well occur particularly in the  
13 hectic workplace of the growing season when the applications  
14 are made.

15 The next factor is good faith in selecting of Profine.  
16 The registration of Proline gave constructive notice to Profine  
17 of the use of Proline. Aceto never consulted an attorney in  
18 clearing the mark. Instead, it had a graphic designer make an  
19 inadequate search and then took her opinion that the mark had  
20 no conflicts. The inadequacy of the search is that search  
21 sought only identical marks to Profine. It did not even  
22 consider similar marks such as Proline.

23 Aceto made an attempt to show good faith by saying  
24 they waited until the Patent and Trademark Office cleared their  
25 mark, but Exhibit 1 showed the Patent and Trademark Office also

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1 notified Aceto that there was a possibility that someone would  
2 oppose and they did not wait to see if someone opposed. What  
3 happened was they received the notice of the application and  
4 simply went ahead without waiting to see if there was any  
5 opposition. Taking the halfway measure awaiting for the mark  
6 to passes publication but not waiting to see whether it is  
7 opposed is not evidence of good faith.

8 THE COURT: But is the converse true, that it is  
9 evidence of bad faith?

10 MR. NEWBURY: No, your Honor. There simply is no  
11 evidence that there was good faith.

12 The next factor, the quality of the product, that is  
13 Aceto's product or the damage that can be caused by the  
14 product. There is no argument here that Profine is not of good  
15 quality. However, the damage that could be caused by Profine  
16 is potentially extreme. We discussed this in connection with  
17 the mistake factor before. I won't repeat myself. At least I  
18 will try not to.

19 THE COURT: I understand that it is the same point.

20 MR. NEWBURY: As to source confusion, Bayer's  
21 reputation is placed out of its control and there is source  
22 confusion. It is always a dangerous situation. Any  
23 dissatisfaction with Profine, whether justified or not, will be  
24 attributed to Bayer and could affect all of Bayer's products.

25 THE COURT: I want to make sure I understand the

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Summation - Mr. Newbury

1 distinction here. If we're talking about source confusion and  
2 not product confusion --

3 MR. NEWBURY: Yes.

4 THE COURT: -- if one can disaggregate the two  
5 theories, if I can given the quality that you've conceded of  
6 Profine 75, thinking of just source confusion for a moment, how  
7 does this come up?

8 MR. NEWBURY: Any number of ways. The user just could  
9 be unhappy with the results they get. It doesn't mean it is a  
10 rational belief.

11 THE COURT: Here, I would look to the question of the  
12 quality of the product in the abstract, not of mistaken  
13 application, which is the quality of the product.

14 MR. NEWBURY: That is the first thing you would look  
15 to. What this factor refers to is actually the damage that can  
16 be caused by the association of confusion of the products.  
17 Certainly we do not contest the quality of the product.

18 THE COURT: Thank you.

19 MR. NEWBURY: The last factor, the sophistication of  
20 the purchasers. All evidence about farm workers is that they  
21 are not sophisticated. You heard Dr. Myers at length about  
22 that and there seems to be no disagreement. They are certainly  
23 not sophisticated about trademarks. Same similar trademarks  
24 put on agriculture pesticides will cause many to think they  
25 come from the same source. It just follows. Farmers

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1 themselves are certainly not sophisticated about it, but they  
2 are sophisticated about growing crops, not about trademarks or  
3 the source of products. Similar trademarks on related products  
4 means they are likely to be thought to come from the same  
5 source.

6 Mr. Kippely told you that the majority of farmers may  
7 consult a professional about what product to use and the  
8 professional rights something similar to a prescription as to  
9 what product to use. If you never seen a prescription that  
10 testimony almost admits the likelihood of mistake. If you  
11 write a prescription, usually they are illegible.

12 THE COURT: I hope farmers have better handwriting  
13 than doctors.

14 MR. NEWBURY: Well, there is no evidence of that and  
15 doctor certainly don't.

16 In a handwritten prescription, it would be so easy to  
17 mistake Proline for Profine. The prescription also does not  
18 reduce likelihood of confusion as to source. Nothing in the  
19 prescription says Proline and Profine do not come from the same  
20 source. Even if they get it right, the source of confusion is  
21 still there.

22 Finally, Mr. Kippely testified that large farmers are  
23 sophisticated purchasers. That is simply contradicted by his  
24 deposition as is his experience with farmers contradicted by  
25 his deposition. He told us totally different things in the



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1 deposition than he testified to on the stand. The testimony he  
2 gave before this Court is simply not credible. It is totally  
3 contrary to his deposition testimony.

4 Thus, balance on all the Polaroid factors leads only  
5 to the conclusion that there is likelihood of confusion. We  
6 ask that you hold for Bayer in this action and issue an  
7 injunction. We also ask for accounting profits based on  
8 Aceto's good faith in adopting and continuing to use Profine.

9 Thank you, your Honor.

10 THE COURT: Thank you.

11 Whenever you are ready, Mr. Getzoff.

12 MR. GETZOFF: Thank you, your Honor.

13 Your Honor, this is a case where there are not a lot  
14 of facts in dispute. The witnesses were generally in agreement  
15 with what these products are, how they are sold, how they are  
16 used, how they are applied, where they are sold from. This is  
17 more a case in terms of deciding the outcome of applying those  
18 facts, applying that evidence to the relevant factors, which  
19 include the Polaroid factors. But of course the Polaroid  
20 factors, as Polaroid said itself is a nonexhaustive list. So  
21 the Court can take into account whatever factors the Court  
22 thinks might be relevant in this particular case to lead to the  
23 ultimate determination whether a likelihood of confusion, not a  
24 possibility of confusion, exists.

25 So let's talk about some of this evidence. We have 38

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Summation - Mr. Getzoff

1 months of concurrent sales from both products. Millions of  
2 dollars' worth. Hundreds of million of dollars' worth of sales  
3 on the part of Bayer and millions of dollars' worth on the part  
4 of Aceto over that three years and two months and not a single  
5 instance of confusion or mistake, either source confusion or  
6 mistake. I agree with the Court that these two theories I  
7 think are two out branches of one overall theory, but I will  
8 try to address them to the extent I need to in the course of my  
9 argument.

10 Now, all of the witnesses agree that when a farmer has  
11 a problem with a particular fungicide, the company hears about  
12 it. Bayer has a specific person whose job it is to field  
13 complaints from farmers and growers with their customer.  
14 Dr. Myers testified that when it has to do with one of his  
15 fungicide products, he hears about it and consults with this  
16 person. Yet, we're in the fourth year, fourth season of  
17 concurrent sales and no one has heard of any issues whatsoever.

18 Now, in absence of that length of time, that amount of  
19 sales with no instances of any of the scenarios of mistake or  
20 confusion that Bayer is proposing, Bayer could have done a  
21 couple of things. It is common in trademark cases for the  
22 plaintiff to commission a trademark survey. It is a common  
23 technique. You hire a survey expert and they go out and survey  
24 the relevant public. We know in this case who those people are  
25 and we know where they shop and where they live because they

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Summation - Mr. Getzoff

1 typically live on their farms. And given that there are  
2 hundreds of millions of dollars at stake for Bayer, why didn't  
3 they get a survey? Knowing that they have no actual confusion  
4 in the fourth year of sales, why not get a survey to show  
5 likelihood of confusion?

6 So we have no survey, no evidence of actual confusion  
7 after all this time and all these sales and the question I have  
8 is: Is this surprising? Is this surprising to us that we  
9 haven't seen some instance somewhere of actual confusion or  
10 mistake? Well, I think the answer why we haven't seen any  
11 instances flows from the rest of the evidence in terms of what  
12 the nature of these products are, who buys them and how they  
13 are applied.

14 Let's talk about the so-called strength of the mark  
15 itself. There are numerous products that start with pro in  
16 this field. Pro is ubiquitous. There is 25 examples in  
17 Exhibit 27 alone. Bayer doesn't claim any exclusivity to pro.  
18 In fact, Bayer itself has diluted this mark Proline by offering  
19 a number of pro formative marks all for goods that are a lot  
20 more similar to Proline than the Profine 75.

21 THE COURT: Is your contention that Proline is not an  
22 inherently distinctive mark?

23 MR. GETZOFF: No, your Honor. Inherent  
24 distinctiveness just means it is not descriptive. Proline is  
25 not a word. Proline has no dictionary meaning.

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Summation - Mr. Getzoff

1 THE COURT: So it is at least suggestive?

2 MR. GETZOFF: It is at least suggestive right off the  
3 bat. Same with Profine, it is not a word. If there is no  
4 dictionary meaning, it has to be inherently distinctive. It is  
5 a protectable trademark from the first use. It is not like  
6 some descriptive word and you have to show some use to show  
7 what we call secondary meaning. That is not this case. It is  
8 inherently distinctive.

9 All trademarks are either inherently distinctive or  
10 have acquired distinctiveness. That doesn't mean they are  
11 strong. In this case when Bayer has a plethora -- these are  
12 Exhibits 32, 33, 34 and 35 -- of other products all starting  
13 with pro, and in the case of fungicide products Prosaro,  
14 Provost, Propulse, they come in the same white two-and-a-half  
15 gallon jug, they have the same trade dress with the green  
16 background and they have will big Bayer double cross logo at  
17 the top strongly identifying that the Bayer products come from  
18 Bayer. Bayer has a strong interest and takes great care to  
19 identify itself, Bayer, the company with its particular  
20 products and they have a slew of products that are all very  
21 similar. And if a farmer was storing these products, you would  
22 have a bunch of these white two-and-a-half-gallon containers  
23 all lined up with all these different brands and yet Bayer  
24 isn't worried that consumers are going to have a slip of the  
25 tongue and grab one bottle when they grab the other.

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Summation - Mr. Getzoff

1 In fact, you heard Dr. Myers testify with respect to  
2 the Proline product one of the reasons he is confident that no  
3 mistake would get made is because he used a little circle  
4 design for the "O" in Proline. That circle design is not  
5 contained in the labels for Provost or Propulse and he is  
6 confident that that was his way to distinguish these. Well, if  
7 that distinguishes these, how does that reconcile Bayer's  
8 entire position in this case that these products are purchased  
9 sight unseen and no one sees the actual labeling and no one  
10 reads the label and some low-level unsophisticated migrant  
11 worker applies these without really connecting any dots to what  
12 he is applying and what crops he is applying to and that is  
13 Bayer's theory in this case. Dr. Myers said, No, my circle  
14 design that I came up with that is what we use to distinguish  
15 my one fungicide pr product from Bayer in the  
16 two-and-a-half-gallon container from the three others that we  
17 have. Obviously, your Honor, Profine does not have the circle  
18 O design for pro. None of the trade dress packaging of Profine  
19 75 is remotely similar.

20 THE COURT: I just want to understand how this  
21 argument sort of fits doctrinally into the factors. I see the  
22 general point about confusion that you are making but at least  
23 making an effort to go through the factors. What authority is  
24 there in thinking about strength of the mark for the position  
25 you started with and then explain to me how you bring in the

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Summation - Mr. Getzoff

1 evidence that you are referring to that just because it is a  
2 suggestive mark and maybe because it has some secondary meaning  
3 doesn't make it strong? What do you point to for that? And  
4 then how does this point you are making about Dr. Myers'  
5 testimony that they are not concerned about confusion of their  
6 own products? Doctrinally how does that fit?

7 MR. GETZOFF: So the first issue is if it is a  
8 protectable trademark is it automatically strong. That  
9 essentially is the question I am hearing, which is if it is a  
10 protectable trademark, which means by definition it is at least  
11 suggestive doesn't that mean it is strong? And the answer is  
12 no. Every trademark case starts with the first element: Do  
13 you have a protectable mark? Which means is it at least  
14 suggestive and a whole separate analysis is how strong is that  
15 mark.

16 THE COURT: Right. The analysis typically consists of  
17 looking where it falls in the spectrum of generic and fanciful.

18 MR. GETZOFF: That's part of it.

19 THE COURT: And then the question of secondary  
20 meaning.

21 MR. GETZOFF: Third party use I would say. So there  
22 are two elements of strength. You are right. What we call the  
23 Abercrombie & Fitch factors, which was the original for that  
24 spectrum. You have strength in terms of is it semi  
25 descriptive, which are weaker marks versus fanciful or

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Summation - Mr. Getzoff

1 arbitrary marks and those are stronger in that sense, but you  
2 also have what the cases talk about marketing strength.  
3 Marketing strength is from the standpoint of the consumers how  
4 distinctive is this mark, how much does this mark stand out  
5 relative to what is out there. Marks that are unique and there  
6 are no other close marks and they stand out among the field,  
7 those are strong marks and those are entitled to a broader  
8 range of protection.

9 In contrast, marks that exist within a crowded field,  
10 crowded field is sort of a term of art as us trademark nerds  
11 use to say that you have a lot of similar marks and they all  
12 have common elements in this same field, the field is crowded.  
13 When the field is crowded like it is here, each mark is weaker  
14 because it has a more narrow scope of protection. Doctrinally  
15 what Bayer has done by marketing a bunch of similar products  
16 all under similar names is essentially weakened each of these  
17 marks. They could have put all their eggs in a pro-type mark  
18 for one product and made that mark stand out. That would have  
19 made it stronger, but they essentially weakened that mark by  
20 offering a number of marks.

21 In fact, they offer Prosaro a fungicide and Provado an  
22 insecticide, which are almost as similar as Proline and Profine  
23 75. I would say they are certainly more similar in terms of  
24 package because they both come from Bayer. This comes in a one  
25 gallon and this is liquid and it is a two-and-a-half-gallon

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Summation - Mr. Getzoff

1 container. They rhyme. They are not worried about confusion  
2 because they train their customers to look carefully at the  
3 actual product name. They are not worried that someone is  
4 going to have a slip of the tongue, even though someone might  
5 and say Provaro when they meant Pavado. I may come in with  
6 this so-called prescription and never look at the label and see  
7 what I am applying and so forth. But they are not worried  
8 about confusion. The reason they are not worried is that for  
9 all these reasons we're talking about, these farmers pay  
10 attention. They have to pay attention. This is their  
11 livelihood.

12 I am now moving into sophistication.

13 THE COURT: I will let you do that. Do you have in  
14 hand authority for the crowded field argument that you are  
15 making?

16 MR. GETZOFF: Not in hand but it is close by, your  
17 Honor. I am certainly going to put it in the proposed  
18 conclusions of law and findings of fact. It is a well known  
19 doctrine of strength of the mark. You have essentially two  
20 kinds of strength. You have the arbitrary versus descriptive  
21 spectrum of strength, but then you have what I think they call  
22 is marketing strength, which is how distinctive is this mark.  
23 How much does this mark stand out among in the field, and I  
24 will provide that to the Court.

25 THE COURT: Go ahead.



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Summation - Mr. Getzoff

1 MR. GETZOFF: So moving on, and I did start to from  
2 strength of the mark sort of started to slide into the  
3 similarity of the mark. So let me dive head on into similarity  
4 of the marks.

5 Now, as anyone looking at the marks just the words in  
6 a vacuum can tell, six out of the seven letters are the same.  
7 The proper analysis for the Court to follow is not to compare  
8 the words in a vacuum. Instead the Court is supposed to look  
9 at how these products, how these marks are viewed in the actual  
10 marketplace, in the real world. Not looking at two pieces of  
11 paper and comparing Profine to Proline, but looking at all the  
12 circumstances in the marketplace, including the trade dress,  
13 packaging and everything else. When you do that in this case,  
14 the similarities just fall apart, your Honor. The two  
15 packaging for Profine 75 and Proline, I don't want to overstate  
16 it, but they really couldn't be more different. You have two a  
17 big two-and-a-half-gallon container, which is a standard size  
18 container for liquid pesticide products and you have a small  
19 10-ounce bottle of granules.

20 Each product clearly says in the case of Profine 75 it  
21 is a herbicide. In the case of Proline it is a fungicide.  
22 They are not saying that for no reason. Number one, the EPA  
23 requires that they say that and the reason the EPA requires the  
24 product say that is because those words have special meaning in  
25 this industry. That is not saying one -- I am trying to think

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Summation - Mr. Getzoff

1 of an analogy to some grocery store product where the seller  
2 gets to make up the word or tagline that goes with the product.  
3 Fungicide has specific meaning to this industry and to these  
4 purchasers and growers as to what it is and what it does. It  
5 has specific meaning to the EPA as to what it is and does.  
6 That is why EPA requires it. Same with herbicides.

7 So the idea here, which would Bayer is proposing  
8 someone would confuse a herbicide with a fungicide in this  
9 market is not supported by the evidence. When you realize the  
10 distinct differences for which each of those productions do,  
11 herbicide and fungicides mean two totally different things to  
12 farmers. No one would confuse in thinking, Oh, it is a  
13 herbicide or fungicide. It is one of those things. No, no,  
14 no. Herbicides, fungicide, insecticide have three totally  
15 different uses and are used and selected and purchased for  
16 three totally different purposes by farmers.

17 I talked about this already but Bayer uses very  
18 similar trade dress. Bayer takes great pains as we seen  
19 through their product to have a commonality among all the Bayer  
20 products to sell their customers, our product comes from Bayer.  
21 They put the big double cross at the top. They use the chevron  
22 design. They use a color scheme for fungicide versus fungicide  
23 and insecticide. As Dr. Myers said he said in between the  
24 categories he will add design elements to help consumers  
25 distinguish between the two. All of Bayer's efforts to

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Summation - Mr. Getzoff

1 distinguish their products from their competitors makes these  
2 products as distinguishable as possible from the Aceto product,  
3 which has none of these design elements, none of the color  
4 scheme, none of the trade dress elements.

5 Just from a quick visualization, whether they are  
6 sitting on the same shelf, I don't believe the evidence shows  
7 that customers, the growers stock these things in their sheds  
8 season after season. They are too expensive and tailored to  
9 specific uses. You buy the product when you need it and use  
10 it. You don't buy it and keep it on hand. Let's assume they  
11 are side by side at the same farm in the same shed, who can  
12 confuse the Proline jug with the Profine 75?

13 THE COURT: Well, take on the argument directly. I  
14 think the notion is something like: The farmer says to the  
15 farmhand, Go apply Proline, and the farmer hears Profine and  
16 then goes hearing Profine and picks up a bottle of Profine.

17 MR. GETZOFF: Yes.

18 THE COURT: And then it doesn't matter what the  
19 different labeling is, it doesn't matter what the different,  
20 packaging is, it doesn't matter if it says fungicide or  
21 herbicide. They heard Profine when they should have said  
22 Proline. They pick up Profine and apply that mistakenly. I  
23 think that is at base the argument.

24 How do you counter that?

25 MR. GETZOFF: You are right, your Honor. I would

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Summation - Mr. Getzoff

1 analogize that argument that that would be a good argument if  
2 we were talking about a pack of gum at 7-Eleven because when I  
3 send my 15-year-old daughter into the store to buy the gum and  
4 I tell her the brand name, frankly there is a 50/50 chance she  
5 is going to come out with the gum that I asked her to get. I  
6 verbally convey it to somebody who -- I will apologize to  
7 Sidney -- is going to mix that up and come out with at wrong  
8 pack of gum. That is the situation they are trying to get us  
9 to buy that the level of sophistication, the lack of care that  
10 goes in to the actual application of these products, this is  
11 not going into a store and buying a pack of gum.

12 At some point, and this is what this hypothesis  
13 scenario doesn't take into account, at some point somebody has  
14 to read the label. At some point in this process. They have  
15 tried to eliminate as much as they can ever looking at the  
16 product or ever looking at the label as much as they can. But  
17 at some point this is undisputed in this case that somebody has  
18 to look at that label to know how to apply the product. That  
19 is not just an EPA federal law, which it is by the way, it is a  
20 practical requirement, which is you need to know how to mix it,  
21 how much to apply, how to apply it, what crops to apply it on.

22 THE COURT: I still don't think that answers the  
23 hypothesis, right? Because if the hypothesis is, The farmer  
24 says apply Proline and the farm worker hears Profine, they go  
25 and get the Profine bottle, they can read the label and apply

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Summation - Mr. Getzoff

1 it.

2 MR. GETZOFF: Well, and apply it, what, to the wrong  
3 crop? So let's take this down. That could only happen for the  
4 overlap crops, number one. So unless you are going to include  
5 in that hypothesis that they are applying it to wheat, for  
6 example, which is a common or one of the cereals which is a  
7 common and big market for Proline, and the farmer is going to  
8 tell a farmhand to go by Profine, he had a slip of the tongue,  
9 and he goes to the ad retailer and that ad retailer probably  
10 isn't even going to have Profine if it is North Dakota, but  
11 let's assume that they do and the fact that they wanted a  
12 fungicide and they received an herbicide, the scenario would  
13 require that distinction never dawned on anybody, that I am  
14 applying this because we have a fungus and I need a crop and I  
15 need this for the focus and I am coming home with an herbicide.  
16 That distinction, which is a significant distinction, gets lost  
17 in this scenario.

18 It would have to be a dry bean farmer. When this case  
19 started, dry beans was the only overlapping crop. Since the  
20 case has gone on, Bayer added corn and then earlier this year  
21 they added rice. So on top of that, you would have to ignore  
22 the fact that these are assisted purchasers. These are  
23 predominately -- and Dr. Myers talked about this -- purchases  
24 where they go not ad retailer and the ad retailer typically is  
25 guiding that purchase. I mean, you just don't buy it off the

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Summation - Mr. Getzoff

1 shelf. This scenario, again like the gum analogy, would make  
2 more sense if the person just picked it off the shelf, I heard  
3 Profine, Profine was sitting on the shelf, I went and the  
4 cashier rang me up and I was out the door. That is not how  
5 these purchases happen. They are assisted purchases.

6 The Second Circuit case law is clear on this that when  
7 you have a high degree of customer assistance in the purchases,  
8 that takes the likelihood of confusion way down because the  
9 chance for mistake when you get an herbicide and you meant to  
10 get a fungicide, among other reasons. Plus part of the  
11 scenario presupposes that the farmer was familiar with Proline  
12 and this is sort of goes to the source confusion, but it also  
13 leaks over to the mistaken confusion is they have experience  
14 and used Proline in the past and so when they ordered it the  
15 next time they accidentally said Profine and got in instead.

16 (Continued on next page)

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Summation - Mr. Getzoff

1 MR. GETZOFF: So there they are supposing, then, that  
2 the person who is actually the applicator, which are  
3 professionals, I mean, there is this effort to sort of  
4 denigrate these people as unsophisticated, and we are using --  
5 we are misdefining "sophisticated" for purposes of trademark  
6 law. These people are sophisticated because they are  
7 professionals. They do this for a living. This is not my  
8 15-year-old daughter going in to get a stick of gum. Again,  
9 apologies, she is not sophisticated. These people's jobs is to  
10 do this. They are paid to do this. Whether they are farmhands  
11 or migrant workers or the professional applicators that the  
12 farmer hires, the ag retailer, to apply, these guys do this day  
13 in and day out for a living. That makes them sophisticated.

14 They have a warehouse stacked, as Dr. Myers said, from  
15 the floor to the ceiling with ag products, ag products, ag  
16 protection products, a lot of them which sound alike. And the  
17 idea that they are going to make this mistake and no one is  
18 going to be the wiser and that it is -- it is sort of like the  
19 person would have to be blind, deaf, and dumb to make this  
20 mistake and get it all the way back to the field and apply it  
21 and have that mistake happen.

22 Once you start to break down the series of events of  
23 stars aligning for this to actually happen, this goes back to  
24 my earlier point, your Honor, it is no surprise it hasn't  
25 happened in four years. This is the scenario of mistake which

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Summation - Mr. Getzoff

1 everyone agrees they would have heard about. It is no surprise  
2 it hasn't happened because it is just so unlikely. It is so  
3 unlikely.

4 Is it possible? Sure. Anything is possible. There  
5 are misapplications of chemicals all the time. Not because of  
6 similarities in trademark. People do grab the wrong bottle.  
7 There are incompetent people once in a while that screw up a  
8 crop application and they get fired because the farmer lost his  
9 yield and heads are going to roll because the investment is so  
10 high. So it's not that could a mistake happen. Is there a  
11 possibility? In this trademark case, is there a likelihood  
12 that this could happen? And, again, the reason we haven't seen  
13 it yet is because it is not likely. It is almost by definition  
14 it is not likely. If it was, we would have seen it.

15 One other point I want to talk about on this issue  
16 with respect to the overlap crops, which I think we agree  
17 that's the only way this could even come out, Aceto sells  
18 Halomax 75 for half the price of Profine 75 and rice and corn  
19 and dry beans and a few other row crops are on the Halomax 75.  
20 Halomax 75 is the row crop version of Profine 75. So, again,  
21 this scenario of mistake that Bayer is proposing further  
22 assumes that a farmer would be, I don't want to say dumb, but  
23 ignorant enough to spend twice as much as he would need to to  
24 buy the wrong halosulfuron product.

25 Mr. Newbury asked, well, we should just presume that



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Summation - Mr. Getzoff

1 because rice and corn and dry beans is on Profine 75 that it is  
2 being used on that. In addition to having no actual direct  
3 evidence of that, the inference, which is what we are talking  
4 about here, the inference is stronger that it is not applied  
5 because it is just not an economically rational decision when  
6 you have the row crop version, the Halomax 75, at half the  
7 price, which is specifically marketed and pushed by the  
8 distributors for those crops. That is a much more likely  
9 inference as to -- for these overlap crops. It is not the  
10 Profine 75 being applied or purchased. It wouldn't be. It  
11 would be the Halomax 75 product.

12 Proximity between the products, this goes to my  
13 earlier point on the difference between fungicides and  
14 herbicides. As Dr. Myers testified, Bayer itself keeps these  
15 markets as distinct as possible. The proximity between the  
16 products, as the Second Circuit has said, the inquiry concerns  
17 whether and to what extent the two products compete with each  
18 other. It is undisputed these products don't compete with each  
19 other.

20 Generally the herbicides are applied -- well, it is  
21 undisputed, Dr. Myers agreed, the Profine 75 is predominantly  
22 applied on vegetables; and Dr. Myers also admitted that  
23 vegetable crops are totally unrelated to the cereal crops and  
24 row crops that the Proline is sold for.

25 The geography as to where these are sold, yes, there

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Summation - Mr. Getzoff

1 is some Proline sold in the south for peanuts. Predominantly  
2 it is sold in the north central plains, and that was evident  
3 from the exhibits that Bayer produced in this case which, by  
4 the way, is the only evidence they produced to us in this case  
5 as to geography. We have those maps showing that there is some  
6 smatterings in the south; it's predominantly in the north. In  
7 the south it is for peanuts. Peanuts is not a Profine 75 crop.  
8 So those are different farms.

9 Likelihood of bridging the gap, the issue is what's  
10 the likelihood that Bayer is going to start using Proline for  
11 an herbicide? That's the gap, that's the inquiry here is  
12 bridging the gap when you have two different product  
13 categories. You have herbicide and fungicides that are totally  
14 distinct, quote/unquote, as Dr. Myers said. What's the  
15 likelihood that Bayer's going to bridge that gap? And the  
16 evidence is that they won't. There is no evidence that Bayer  
17 is going to expand Proline to a totally different product  
18 category of herbicides.

19 THE COURT: Why is that in question, again, sort of  
20 except taking their theory, and you have made the point that it  
21 is not just a possibility of mistake, but a likelihood. Isn't  
22 the bridge gapping here the increase of that likelihood with  
23 the increase of overlapping crop --

24 MR. GETZOFF: Well, if they were going to -- let me  
25 start with if the plan was that Bayer was going to move Proline

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Summation - Mr. Getzoff

1 into herbicides, that would take these products much closer  
2 together.

3 THE COURT: Right. I understood that. My question is  
4 why is that the bridge to be gapped and not a bridge to  
5 increased usage on overlapping crops with one still being  
6 herbicide and the other being a fungicide, in light of their  
7 theory of mistake?

8 MR. GETZOFF: That is a different gap to be crossed,  
9 and I understand that they want to move to that gap. That gap  
10 is not -- the case law talks about the product. If you have  
11 different products, what's the chances that the senior user is  
12 going to move into the other -- into the junior user's product,  
13 and that distinction is fungicide/herbicide. So faced with  
14 that, there is no chance of that bridging, they move to, well,  
15 but you have got overlapping crops that may increase.

16 So I would say, first, that's a different gap that  
17 doesn't get you over the bigger gap, which these are still  
18 fundamentally different products. So you are still faced with  
19 the problem of someone confusing an herbicide with a fungicide  
20 which, given what these products do and why they are being  
21 purchased, that's just not a mistake that farmers make, not if  
22 they are going to stay in business.

23 But the only evidence we have of that, aside from what  
24 they have done to date, is plans for the future. They have a  
25 plan to file for cucurbits. They haven't filed yet. EPA

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Summation - Mr. Getzoff

1 hasn't even started on that process because Bayer hasn't done  
2 anything yet, but the testimony was we plan to do it on May 25.  
3 Well, whether they -- this trial has been set for a long time.  
4 If they wanted to get that going, I would have thought they  
5 would have had that in the works before trial, so they could  
6 say we are in the process.

7 THE COURT: They did rice, they have added rice and  
8 corn and cucurbits to come.

9 MR. GETZOFF: But cucurbits hasn't been filed yet. My  
10 point on cucurbits is rice, corn, the row crops, fine, yes,  
11 they have been added and those are row crops and we are not  
12 worried about row crops. Profine 75 isn't used on row crops.  
13 If it wasn't for the fact that Gowan -- and this was in the  
14 testimony, your Honor, the only reason the crop listings on  
15 Profine 75 and Halomax 75 are the same as the crop listings on  
16 the brand names that they are competing against, the Gowan  
17 Permit and the Gowan Sandea, and as Mr. Feinman testified, they  
18 are restricted -- their distributors, to be able to push this  
19 product and convince their customer base, the growers, that  
20 this is the ibuprofen alternative to Advil for half the price,  
21 customers are still like the brand. Some people still by Advil  
22 even though it costs more. And I, frankly, don't understand  
23 why anyone would buy Advil, but I see it around, so people  
24 still buy Advil.

25 You have to convince people that it is exactly the

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Summation - Mr. Getzoff

1 same, and once you start having differences in the crops, you  
2 hurt your ability to push it to farmers. So that's why Profine  
3 has crops listed that they don't expect to make any sales for,  
4 because that's how Gowan has it.

5 Cucurbits, one point I want to make on the future  
6 plans of Bayer to add vegetables, and this came out in  
7 Dr. Myers' testimony is, this plan to add vegetables is not  
8 because they expect to make sales to those vegetables. It is  
9 taking advantage of the system that EPA allows which is if you  
10 add minor use crops, you can extend your exclusivity. The name  
11 of the game for the big six pesticide companies like Bayer is  
12 you have got your 17 years of exclusivity, 15 years, whatever  
13 it is, which means you enjoyed the monopoly power, which the  
14 EPA encourages because you have a lot of investment to recoup,  
15 but after that time, that's the balancing act. We want the  
16 generics to come in to lower the prices for the farmers, which  
17 helps the consumers and helps everybody. They get to extend  
18 that monopoly by three years if they add cucurbits.

19 They can't stop with cucurbits. As Dr. Myers said,  
20 you have to add lots of minor use crops to get that three  
21 years. Cucurbits is the first. But it's not because they  
22 expect to start having Proline on the shelf with cucurbits  
23 farms. It is so that they can keep the generics out for three  
24 years and maintain these hundreds of millions of dollars that  
25 they get by being the monopoly. So they are adding vegetables

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Summation - Mr. Getzoff

1 which they say they are going to do, they haven't done it yet.  
2 Again, doesn't affect the analysis because the reason they are  
3 doing it isn't to make sales, it is to keep the generics out  
4 for all the crops, which is what they are allowed to do under  
5 FIFRA.

6 Let me move on to the good faith/bad faith.

7 THE COURT: I should say you are at your time. I have  
8 kept you longer. I will give Mr. Newbury some additional time  
9 for his rebuttal if he wants it, but you should start wrapping  
10 up.

11 MR. GETZOFF: I will wrap up.

12 Your Honor, bad faith in a trademark case, when the  
13 junior user has an intent to trade off the goodwill of the  
14 senior user, it is copying. It is a counterfeit type of claim  
15 where they have got a product that's enjoyed, a lot of  
16 commercial success, and I am going to ride their coattails. I  
17 am going to trade off of their goodwill and offer the same  
18 product under a close-enough name that I can get away with and  
19 try to confuse people, try to actually make people think I am  
20 their product because that will boost my sales. That is not --  
21 there is not even a suggestion let alone evidence that that is  
22 the case here.

23 Bayer spent a lot of time criticizing Ms. Cara Strazzo  
24 for not being an attorney. They overlook the fact the  
25 trademark office did their own search. The trademark office

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Summation - Mr. Getzoff

1 approved the mark for publication in light of all of the  
2 registered marks that were in existence, including Proline. So  
3 they didn't criticize Ms. Strazzo for not being a lawyer and  
4 not being a trademark expert. They can't criticize the U.S.  
5 Patent and Trademark Office for not being experts. This is  
6 what they do. This is their statutory mandate, to perform a  
7 likelihood of confusion analysis and only allow those marks  
8 that pass that test. That's what happened here. And the  
9 product was only sold after the mark was approved.

10 There is that second step. It gets published for  
11 opposition so someone like Bayer can come in, like they did  
12 here, and say, We disagree with what the trademark office said.  
13 We do think there is a likelihood of confusion, and we are  
14 willing to fight that fight. That's what happened here. That  
15 doesn't negate the fact that you had an independent, objective  
16 expert, the trademark examiner, who did do a search, who did do  
17 the analysis and concluded that there was no likelihood of  
18 confusion. That's Aceto's good faith.

19 We have already covered, your Honor, I think  
20 everything else. I was going to talk about -- go through the  
21 scenario and break that apart, but I think we already covered  
22 that in the course of the court's questioning.

23 Again, your Honor, Bayer's case is based on  
24 possibilities. Is this possible? Could this happen? Yes.  
25 And we will readily admit that it is possible in the way that

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Rebuttal - Mr. Newbury

1 anything is possible, but that's not the standard. The  
2 standard is, is it likely? Is it likely to happen? And given  
3 the 38 months of sales, the significant sales, these products  
4 have been sold concurrently now longer than Bayer's mark was  
5 sold on its own. Bayer's mark was sold for about two years  
6 before Aceto came in in 2009. They are now both in their  
7 fourth year of concurrent sales. If likelihood of confusion  
8 was -- if confusion was likely, we would have seen it by now.

9 Thank you, your Honor.

10 THE COURT: Thank you.

11 Mr. Newbury, about ten minutes. Does that sound --

12 MR. NEWBURY: I don't think I need that much, your  
13 Honor.

14 THE COURT: Go ahead.

15 MR. NEWBURY: I hope I don't, anyway.

16 Going here in reverse order, we never claimed there  
17 was a possibility of confusion. Our position from the get-go  
18 has been that there is a likelihood of confusion. That is  
19 simply a red herring we throw out there.

20 Next, we heard a reference to the trademark examiner's  
21 finding as being evidence of good faith. It is just settled  
22 that the fact that a trademark examiner didn't find likelihood  
23 of confusion is entitled to no weight. Otherwise, the  
24 trademark law wouldn't even be set up with opposition  
25 proceedings. The whole purpose of the examination is to see if



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Rebuttal - Mr. Newbury

1 it can be even passed to publication, so that the parties that  
2 might be damaged will then oppose. If you want a citation for  
3 that, I can give you *Kos Pharmacy v. Andrx Corporation*, 369  
4 F.3d 700, 714-15 (3rd Cir. 2004).

5 To defend Dr. Myers, he did say one reason for going  
6 to cucurbits was to get the extension with other products. He  
7 didn't say it was the only reason. In fact, he did say they  
8 fully expect to sell cucurbits.

9 There was a citation on the related goods to a case,  
10 saying related goods depends how much they compete with the  
11 other products. That citation comes from a case in Aceto's  
12 pretrial brief, and that case dealt with competitive products.  
13 We are not dealing with competitive products here. I am  
14 looking for the citation.

15 THE COURT: That was talking about proximity of the  
16 market.

17 MR. GETZOFF: That's correct, it was not.

18 THE COURT: So that was the factor we were talking  
19 about and the point that Mr. Getzoff made, citing the Second  
20 Circuit case.

21 MR. NEWBURY: That particular quotation, that case  
22 deals with competitive products. We are not talking about  
23 competitive products here. It has nothing to do with this  
24 situation. In the *Clinique* case from this district, 945  
25 F.Supp. at 553, they talk about the factors being -- the

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Rebuttal - Mr. Newbury

1 factors for proximity being the class of customer -- consumers  
2 to whom the products are sold, the manner of advertising, the  
3 channels through which the goods are sold, and the extent to  
4 which the goods or services fall within the same class or are  
5 used together. Those are the factors we relied on and they  
6 showed proximity of the products.

7           Going to the strength of the mark, we have some  
8 difficulty with the CEO's arguments. First, as to our own  
9 products using "pro," somehow weakening our mark, those are our  
10 products. There is not going to be any confusion there. They  
11 are Bayer products. We are entitled to use whatever marks we  
12 want on them. Anyway, those marks don't have the overall  
13 similarity of Proline and Profine. They simply have nothing to  
14 do with this case. There is a similarity of Proline and  
15 Profine. We don't claim exclusive rights in "pro." We claim  
16 exclusive rights in Proline and that those rights are infringed  
17 by the use of Profine.

18           The third-party uses that we are referring to, as I  
19 said, there is no evidence as to any use as to the extent of  
20 use. Beyond that, they deal only with "pro." They don't deal  
21 with Proline. The marks, you even heard testimony, there is  
22 nothing there even close to the overall similarity of Proline  
23 and Profine. They simply cannot weaken the product.

24           Finally we heard the usual refrain, there is no  
25 evidence of actual confusion. But there was no addressing the

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Rebuttal - Mr. Newbury

1 fact of evidence of actual confusion is not necessary and is  
2 considered difficult to obtain.

3           There was a mention that we didn't do a survey.  
4 Surveys are sometimes used in complex cases. This is not a  
5 complex case. The cost of a survey is very high and difficult,  
6 and the time consumed in doing them and the services of an  
7 expert, a choice was made not to do it in this case. There are  
8 case after case that says there is no requirement that you do a  
9 survey.

10           The most interesting thing here in the entire closing  
11 argument, we still heard no argument that the user of Profine  
12 will not think it comes from the same company as Profine. We  
13 have heard a lot about you won't buy an insecticide when you  
14 want a fungicide, but we haven't heard anything respecting that  
15 confusion of source. And that is the test for a likelihood of  
16 confusion.

17           Thank you, your Honor.

18           THE COURT: All right. Thank you.

19           That concludes trial in this matter. As I have  
20 indicated, I would like post findings of fact and conclusions  
21 of law from the parties. We set a week from today for  
22 simultaneous filing from each side, the following Monday for  
23 any response or opposition to that, and I have asked for the  
24 parties to come together and agree on a final submission to me  
25 of all trial exhibits that were entered. My deputy keeps

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1 track, too, so once you come to your agreement, she will just  
2 check her list. But I will give you my binders to make the  
3 copies now. I think that's probably easier than having you  
4 work on it and send it in. If I am wrong about that, do as you  
5 would like.

6 Anything further before I adjourn?

7 MR. BARENGOLTS: No, your Honor.

8 MR. NEWBURY: We thank you for your time, your Honor.

9 THE COURT: Thank you.

10 MR. GETZOFF: Likewise; thank you for your time and  
11 attention, your Honor.

12 THE COURT: I thank counsel for both sides for their  
13 excellent presentations and arguments.

14 With that, we are adjourned. The matter is submitted  
15 to the court.

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